

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VERNON WAYNE MCNEAL,
Plaintiff,
v.
EVERT, et al.,
Defendants.

No. 2:05-cv-441-GEB-EFB P

ORDER

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Defense counsel has filed a Notice of Suggestion of Death of Defendant Chatham. ECF No. 167. Plaintiff responded with a motion for substitution of a proper party under Federal Rule of Civil Procedure 25(a). ECF No. 172.

Rule 25(a)(1) of the Federal Rules of Civil Procedure governs the substitution of parties after death, providing for substitution where the claim is not extinguished by the death of the party. In *Robertson v. Wegmann*, 436 U.S. 584 (1978), the Supreme Court held that the law of the forum state is “the principle reference point in determining survival of civil rights actions” under section 1983. *Id.* at 590; *see also Moor v. Alameda County*, 411 U.S. 693, 703 n.14 (1973) (noting that pursuant to 42 U.S.C. § 1988, state survivorship statutes may allow the survival of actions brought under § 1983). Under California law, a cause of action against a person is generally not lost by reason of the person’s death. Cal. Civ. Proc. Code § 377.20(a). Therefore,

1 Chatham's death did not extinguish the claim against him, and a motion for substitution is
2 appropriate in this case.

3 However, to substitute a new defendant for defendant Chatham under Rule 25(a), the
4 court must know the party to be substituted. It appears that defense counsel here has not satisfied
5 the provision in Rule 25(a)(3) which requires not only the filing of a notice of suggestion of death
6 with the court and service of the notice on plaintiff, but also service of the notice on the proper
7 party to be substituted in the place of the deceased.¹ *Barlow v. Ground*, 39 F.3d 231, 233 (9th
8 Cir. 1994) (a statement noting the death must be served on "nonparty successors or
9 representatives of the deceased . . . in the same manner as required for service of the motion to
10 substitute."). In turn, apparently due to that failure, plaintiff has not served his motion for
11 substitution on that party (or seek service by the U.S. Marshal) as Rule 25(a)(3) also requires.

12 Accordingly, it is hereby ORDERED that:

13 1. Plaintiff's March 26, 2014 motion for substitution (ECF No. 172) is denied without
14 prejudice.

15 2. Within 30 days of the date of this order, defense counsel shall endeavor to discover the
16 identity of the proper party for substitution and either: (a) serve the notice of
17 suggestion of death on that party, along with re-service on plaintiff and filing with the
18 court or (b) file a declaration documenting the steps taken to discover the proper
19 party's identity and why such person's identity could not be discovered.

20 3. Should defense counsel file a new notice of suggestion of death with service on the
21 proper party for substitution, plaintiff shall have 90 days from the date of service of
22 such notice to file a new motion for substitution. In light of plaintiff's in forma

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27 ¹ Courts have held that executors, administrators or distributees of distributed estates are
28 proper parties for substitution of a deceased party. *See Sequoia Prop. & Equip. Ltd. P'ship v. United States*, No. CV-F-97-5044, 2002 WL 32388132 at *2 (E.D. Cal. June 3 2002); *Sinito v. U.S. Dep't of Justice*, 176 F.3d 512, 516 (D.C. Cir. 1999).

1 pauperis status, the court will order service of that motion on the proper party
2 identified by defense counsel.

3 So ordered.

4 DATED: February 11, 2015.


5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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